

Decision **PROPOSED DECISION OF ALJ MASON** (Mailed 12/29/2014)**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

In the Matter of the Application of the City of
San Clemente for an order authorizing the
alteration and improvement of seven existing
San Clemente Beach Trail At-Grade Crossings.

Application 11-08-004
(Filed August 2, 2011)

DECISION DISMISSING APPLICATION**Summary**

This decision dismisses the application on the grounds that the California Court of Appeal has held that the Commission is without jurisdiction to approve the City of San Clemente's request to install an Audible Warning System as a Supplemental Safety Measure at each of seven San Clemente Beach Trail pedestrian crossings. Further, as the City of San Clemente has failed to identify any other aspects of the application that would require Commission approval and would not be precluded by the Court of Appeal's holding, the application is dismissed.

The City of San Clemente may file a new application at a later date if it is able to demonstrate that there are additional safety measures that it would like to undertake at the seven San Clemente Beach Trail pedestrian crossings, and that the Commission has the jurisdiction to approve these additional safety measures.

This proceeding is closed.

1. Background

On August 2, 2011, the City of San Clemente (Applicant) filed the

above-captioned application seeking approval from the Commission to install an Audible Warning System (AWS) as a Supplemental Safety Measure at each of seven San Clemente Beach Trail pedestrian crossings. The seven crossings which are the subject of this application are the Dije Court Crossing, the El Portal Crossing, the Corto Lane Crossing, the San Clemente Pier Crossing, the T Street Crossing, the Lost Winds Crossing, and the Calafia Crossing. The AWS is provided in addition to Commission Standard No. 9 automatic warning system.

Before the Commission could consider and dispose of the application on the merits, BNSF Railway (BNSF) filed a Petition for Writ of Review challenging the lawfulness of Decision (D.) 12-08-028, wherein the Commission determined it had jurisdiction to resolve the application. On August 5, 2013, the Third Appellate District of the California Court of Appeal (Case No. C072746.) reversed D.12-08-028 in *BNSF Railway Company et al. v. Public Utilities Commission of the State of California* (2013) 218 Cal.App.4th 778 (Opinion). The Court of Appeal held that only an audible warning device mounted on a train could be used at every pedestrian rail crossing, and therefore, the Commission had no authority to consider an application that might authorize otherwise.

The Opinion is now final because all judicial review has been completed. The Commission's Petition for Rehearing in the Court of Appeal and its Petition for Review at the California Supreme Court were denied.

Since then, the Commission's Safety and Enforcement Division (SED) has been working with the City of San Clemente to determine if any of the other relief sought by the application could proceed (with or without a Commission decision) if it was not affected by the Opinion. SED states it has approved the improvements requested in the application, minus the wayside horns, and the

improvements are now in place. From staff's perspective, the application can be dismissed.

Recently, the assigned Administrative Law Judge (ALJ) invited the parties to comment, via e-mail, on whether the proceeding should be dismissed. On October 9, 2014, counsel for BNSF responded that "the City's application inextricably ties wayside horns and improvements to restrictions on horn use." On October 9, 2014, counsel for City of San Clemente responded and disagreed with BNSF's position. Counsel for City of San Clemente further stated his client would consider the issue of dismissal and advise him accordingly. A further response from the City of San Clemente was not received.

In view of the information learned to date, this application should be dismissed as there does not appear to be any aspects remaining in the application, unaffected by the Court of Appeal's decision, that require a Commission decision.

2. Comments on Proposed Decision

The proposed decision of the ALJ in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. No comments were filed.

3. Assignment of Proceeding

Catherine J. Sandoval is the assigned Commissioner and Robert Mason III is the assigned ALJ and presiding officer in this proceeding.

Findings of Fact

1. This proceeding was filed on August 2, 2011.
2. In D.12-08-028, the Commission determined it had jurisdiction to resolve the application.

3. On August 5, 2013, the Appellate District of the California Court of Appeal (Case No. C072746) reversed D.12-08-028 in *BNSF Railway Company et al. v. Public Utilities Commission of the State of California* (2013) 218 Cal.App.4th 778.

4. The parties were invited and did comment if there are any remaining issues for the Commission to resolve by way of a vote in light of the Court of Appeal's ruling that the Commission lacked the jurisdiction to permit the City of San Clemente to alter the warning system at the seven existing San Clemente Beach Trail at-grade crossings.

5. SED advised that it approved the improvements requested in the application, minus the request for the AWS, and that the improvements are now in place.

Conclusions of Law

There is nothing pending in the application that requires the Commission to render a decision.

O R D E R

IT IS ORDERED that:

1. Application 11-08-004 is dismissed.

This order is effective today.

Dated _____, at San Francisco, California.